SUPREME COURT, U. S.

JUN 5 1968

JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 932

PERCY HENRY,
Defendant-Appellant,

v.

STATE OF LOUISIANA
Plaintiff-Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

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MOTION TO DISMISS OR AFFIRM

NOW RESPECTFULLY COMES the State of Louisiana, plaintiff-appellee herein, who moves that the appeal by Percy Henry, defendant-appellant, be dismissed or that his conviction and sentence be affirmed on the following grounds:

I.

The appeal does not present a serious federal question.

II.

The appeal, through the manner in which the record was prepared and lodged, presents nothing for this Court to adjudge upon in the area of obscenity.

III.

The recent pronouncement of this Court concerning trial by jury in State criminal proceedings should not be retroactively applied.

IV.

In support of this motion and in further response to appellant's jurisdictional statement, a brief is attached to and made part of this motion.

WHEREFORE, appellee, the State of Louisiana, prays that this motion be maintained and this appeal be dismissed or that the judgment of the Supreme Court of Louisiana affirming the sentence and conviction of appellant be affirmed, all at appellant's cost.

MAY IT PLEASE THE COURT:

In the maze of "obscenity" decisions—replete with changing definitions, modes, variances and group enticements—one central theme is nonetheless prominent. It is that this Court has consistently held, up through *Roth vs. United States*, 354 U. S. 476 and resting now at *Ginsberg vs. New York*, Oct. Term, 1967, No. 47, that obscenity is beyond the area of constitutionally protected expression. The central query then is what is obscenity within an objective framework and within constitutional limitations.

In the *Roth* case, supra, this Court enunciated a workable and practical definition or standard of obscenity—a definition that permitted the citizenry it-

self to set the tone and maintain its own house within the area of obscenity.

And with the Court's decision in *Ginsburg vs. United States*, 383 U. S. 463, matters *dehors* the obscenity *vel non* of the subject matter was permitted.

II.

Eleven "girlie" magazines form the basis of the State's prosecution against Percy Henry. These magazines were found to be obscene by all opinion witnesses at the trial and by the Trial Judge himself. The test applied by them was that of *Roth*, and it is thus proper to conclude that the material was therefore obscene in the constitutional sense as well as obscene *per se*.

The Louisiana Supreme Court made no expression on the obscenity *vel non* of the publication. This was so because appellant, in bringing his appeal to that Court, failed to append and lodge the books as a part of the initial record. In commenting on this, the Louisiana Supreme Court said:

> "Whether it failed to meet such a test can be determined only by an inspection of the material itself which is not, legally or actually, a part of the record before us, this for the reason that defendant did not request that the exhibits be attached to any of his bills.
>
> "The record discloses that the defense was based primarily, if not exclusively, on the theory that the accused had not examined and did not know

the contents of the material he sold and, consequently, could not have intended by his conduct to appeal to the prurient interest of the average persons. (He has made no attempt in this court to defend the magazines' content.) He introduced no testimony to show that the material was not obscene (by any standards) or that it had any saving graces whatsoever, such as artistic or literary value. In view of these circumstances, as well as for the reason that the magazines are not before us, we cannot say that the District Court's ruling that they are legally obscene does not meet the constitutional tests judged by a national yardstick." *State vs. Henry*, 250 La. 682, 198 So. 2d 889, 895.

Yet appellant through indirect means accomplished by attaching the eleven magazines to his rehearing application before the State Supreme Court (which application was denied), now urges this Court to declare that the material is not in fact or as a matter of law obscene. Such a scheme of appellate procedure is unduly evasive, improper and contrary to the spirit of appeals to this Court. It should not be sanctioned or allowed. *Ciucci vs. Illinois*, 356 U.S. 571 (1958), *Wilson vs. Cook*, 327 U. S. 474 (1946).

But apart from appellant's failure to properly bring the subject matter of the prosecution before this Court, and taken within the ambit of the *Roth*, supra, and *Ginzburg vs. United States*, 383 U. S. 463 (1966) holdings wherein appellee understands the test of ob-

scenity to permit consideration beyond the material *per se*, it seems appropriate to remind this Court that appellant himself testified as to his pushing and pandering of the material and to his obvious *scienter*.

Appellant operated a self-service type grocery store in the City of New Iberia (population approximately 30,000) wherein he maintained a public "newsrack" housing various publications. The magazines forming the subject matter of the prosecution were openly displayed on this rack. Appellant, prior to his arrest, was admonished by the police officials of the City and by interested citizens that the magazines were at variance with prevailing standards. Appellant rejected these admonitions. Appellant was aware of the content of the material and stated that oil field workers were particularly attracted to that type of publication. Appellant was thus content to accommodate that class of adults seeking the "girlie" books and to open and display the magazines to the public at large. He thus pandered his material on the public at large and he should not, therefore, be afforded the protection of this Court's decisions in *Redrup vs. New York*, *Austin vs. Kentucky* and *Gent, et al vs. Arkansas*, 386 U. S. 767 (1967).

III.

A misdemeanor cannot be tried to a jury in Louisiana. La. Const. Art VII, Sec. 41; LSA-R.S., Title 15, Sec. 340. Appellant, being charged with the crime of obscenity, a misdemeanor under Louisiana law (LSA-R. S., Title 14, Sec. 2) was tried by the District

Judge without intervention of a jury. The procedure prevailing in Louisiana at the time of the trial, February 28—March 1, 1966, sanctioned no other procedure.

Punishment for the variety of obscenity charged against appellant carried with it a fine of not less than $100 or more than $500 or one year imprisonment, or both. Appellant was sentenced, after his lower court conviction, to pay a fine of $301, plus court costs, or to serve 30 days in the parish (county) jail.

Although appellant timely requested a trial by jury in the lower court, this contention was abandoned by him on appeal to the State Supreme Court. Nonetheless, in view of this Court's recent holding in *Duncan vs. Louisiana*, Oct. Term, 1967, No. 410, it now appears evident that Fourteenth Amendment due process guaranteed appellant trial by jury. The question then is whether this holding applies back to the trial of appellant which took place eight months before the alleged crime in *Duncan* even occurred and some 28 months before the opinion was handed down in that case. A similar question was raised in *Johnson vs. New Jersey*, 384 U. S. 719 (1966), wherein a rule of nonretroactivity was adopted for pre-*Escobeto* and *Miranda* cases. The same rule should obtain here. *Linkletter vs. Walker*, 381 U.S. 618 (1965), *Tehan vs. U.S., ex rel. Shott*, 382 U.S. 406 (1966).

Conclusion

(1) Appellant failed to present a serious federal question for review in this Court. The material judged

as obscene by the Trial Court was not brought up on appeal to the State Supreme Court and should not be considered here. The absence of this material leaves nothing for review.

(2) Alternatively, and should the Court elect to view and consider the material, it should then be declared obscene and the conviction and sentence of appellant affirmed, because of the material's obvious prurient appeal, and the specific pandering and pushing thereof by appellant.

(3) Although appellant timely requested trial by jury, the prevailing law did not sanction such request and the decision in *Duncan* should not be retroactively applied to cases theretofore tried and now pending appeal.

(4) This appeal should be dismissed or the conviction summarily affirmed but, in the absence of this, the Court should grant a writ of certiorari to the Supreme Court of Louisiana, set the case for oral argument and briefing, and thereafter devise and formulate a workable, realistic and practical guideline as to obscenity, both in the ordinarily accepted and constitutional sense.

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The undersigned hereby certifies that the above and foregoing motion and brief in support thereof has been served upon opposing counsel by depositing a copy thereof in the United States mail, postage prepaid, and properly addressed to said counsel.

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